No. 78-6798

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

RICHARD HENRY BRYAN

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 591 F.2d 1161.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1979. A petition for rehearing was denied on May 4, 1979. The petition for a writ of certiorari was filed on June 6, 1979 and is thus out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's evidence of homosexual attacks, offered as a defense to an escape prosecution, was properly excluded where petitioner was in a position of safety when he escaped and remained in hiding following his escape.

2. Whether the trial court abused its discretion in ruling that evidence of petitioner's previous convictions were admissible to impeach his credibility should he elect to testify.

3. Whether the trial court's instruction to the jury to consider the extent to which the testimony of each witness was supported or contradicted by other evidence was proper.

4. Whether testimony by a federal agent that petitioner said nothing during two visits with the agent deprived petitioner of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of escape from the custody of the Attorney General, in violation of 18 U.S.C. 751(a). Petitioner was sentenced to five years' imprisonment to run consecutively to a sentence previously imposed. The court of appeals affirmed.

1. The government's evidence showed that petitioner, who was serving a 22-year bank robbery sentence in the United States Penitentiary in Atlanta, was temporarily transferred to a hospital in Atlanta for medical treatment (Tr. 68, Pet. App. 2). On July 10, 1976, petitioner escaped from the hospital (Tr. 75-77, 90-95). Six months later, he was arrested by local police in Georgia on a murder warrant. He was transferred to federal custody and subsequently returned to the Atlanta penitentiary (Tr. 142, 153).

2. Prior to trial, petitioner requested writs of habeas corpus ad testificandum to obtain the testimony of other inmates from the penitentiary to support a duress defense. In an offer of proof, petitioner alleged that prior to his transfer to the hospital, he had been sexually assaulted by inmates on several occasions, that

prison officials were generally apathetic to such attacks, that when he complained to a guard no relief was provided, and that the only way he could avoid such attacks was to submit to administrative detention. He also claimed that resort to the courts would not have provided timely relief, and that at the time of his escape, he anticipated being returned to the Atlanta penitentiary (R. 66-72). The trial judge refused to issue the writs. Relying upon United States v. Michaelson, 559 F.2d 567 (9th Cir. 1977), he reasoned that the duress defense was unavailable because petitioner failed to surrender following his escape (R. 82-84).

Following presentation of the government's evidence, petitioner again sought to introduce evidence of homosexual assaults to support his defense that he did not entertain the requisite intent to escape, and to rebut evidence of intent presented by the government (Tr. 156-159). The trial court excluded the evidence (Tr. 159).

ARGUMENT

1. Petitioner contends that evidence of homosexual attacks at the penitentiary was admissible both to establish a duress defense and to demonstrate that he lacked the requisite intent to escape. The question whether such evidence is relevant in a prosecution for escape is pending before this Court in United States v. Bailey, cert. granted, No. 78-990 (March 19, 1979).

a. As we explain in our brief in United States v. Bailey, supra (Br. 21-34)[1/], duress can constitute a defense to prison escape, but its potential for abuse in this context has prompted courts to impose stringent limitations on its availability.

1/ "Br." refers to our brief in Bailey, supra. We are sending a copy of that brief to counsel for petitioner.

Specifically, the escapee must establish that:

> [He] is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
> (2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
> (3) There is no time or opportunity to resort to the courts;
> (4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and
> (5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

People v. Lovercamp, 43 Cal. App. 3d 823, 831-832, 118 Cal. Rptr. 110, 115 (1975). Accord, e.g., United States v. Boomer, 571 F.2d 543 (10th Cir.), cert. denied, 436 U.S. 911 (1978).

Before this Court in Bailey is the question whether the return requirement is properly an element of a duress defense where, as here, petitioner is charged simply with escape from custody, rather than escaping and remaining at large. However, the court of appeals noted (Pet. App. 2-3) that petitioner's failure to fulfill virtually any of the other special requirements makes the defense unavailable to him regardless of the applicability of the return requirement. Thus, while the defendants in Bailey escaped from a confinement facility where they were allegedly subject to threats, assaults and cellblock fires (Br. 4-5),[2/] petitioner escaped while in a position of complete safety at a private hospital where he was safe from the alleged homosexual attacks. And, in contrast to

2/ In Bailey, we argue that the alleged threats and assaults and the history of alleged cellblock fires failed to fulfill the immediacy element of the duress defense because these incidents occurred several weeks before the escape (Br. 34-42).

several of the defendants in Bailey, who allegedly filed complaints with the prison administration or with the court while in jail (Br. 36-37 & n.24), petitioner sought no relief through established channels although he had ample opportunity to do so while in the hospital. Instead, he simply concluded that petitions to prison authorities would be unavailing or result in reprisals, and that efforts to obtain a judicial remedy would not result in timely relief.

b. On the other hand, the admissibility of evidence of homosexual assaults to demonstrate the absence of intent to escape is similar to the issue, presented in Bailey, whether escape under 18 U.S.C. 751(a) entails intent to avoid the normal incidents of confinement or intent "only to avoid conditions that are not normal aspects of confinement -- such as * * * homosexual attacks." United States v. Bailey, 585 F.2d 1087, 1093 n.17 (D.C. Cir. 1978). The majority of the court of appeals in Bailey reasoned that evidence that the defendant was subject to abnormal conditions is relevant to the question whether he escaped only to avoid such conditions or whether, in addition, the defendant also intended to avoid the confinement itself (ibid.).[3/]

3/ In Bailey the defendants were permitted to present evidence showing assaults, threats and cellblock fires, but the trial judge simply instructed the jury that escape is a "general intent" offense, and that a general intent involves only the "purpose to do something, the will to do the act" (Br. 8). The court of appeals there held that this instruction did not permit the jury to decide the factual question whether the defendants were motivated by the improper desire to avoid confinement conditions or the permissible desire to avoid abnormal conditions of confinement (Br. 11). In United States v. Cogdell, 585 F.2d 1130 (D.C. Cir. 1978), cert. granted, No. 78-990 (March 19, 1979)), a companion case, the same trial judge refused to permit the introduction of similar evidence. The court of appeals in that case held that, for the reasons set forth in Bailey, such exclusion was improper. 585 F.2d at 1132 & n.2.

But whatever the factual distinctions between this case and the Bailey cases, we think it appropriate that this Court defer a decision in this case until it decides Bailey. If Bailey is affirmed, the petition should be granted and the case remanded to the court of appeals for reconsideration in light of Bailey. If Bailey is reversed, the petition should either be denied, or granted and remanded for reconsideration, depending on whether the decision in Bailey leaves room for the consideration of the evidence that the trial court excluded here.

2. None of the other issues presented in the petition warrants review by this Court.

a. Petitioner contends (Pet. 14-16) that the trial judge prevented him from testifying in his own behalf by refusing to exclude evidence of his previous convictions to impeach his credibility.

Following the court's refusal to entertain the testimony of other witnesses concerning conditions at the Atlanta penitentiary, petitioner stated that he was considering whether to testify on his own behalf to explain that his escape was prompted by fears of recurring homosexual assaults (Tr. 172-175, 180). To assist in making this decision he inquired whether the prosecutor would introduce evidence of his previous convictions to impeach his credibility, and requested a ruling by the court whether such evidence would be admissible (Tr. 172). The prosecutor responded that he would offer evidence of a 1968 bank robbery conviction, a 1969 escape conviction, a 1970 premeditated murder conviction, and a 1976 voluntary manslaughter conviction. After hearing argument by both sides concerning the impeachment value and admissibility of these convictions (Tr. 173-178), the court ruled that they would be admitted for impeachment purposes (Tr. 178). Petitioner announced that, in view of this ruling, he would not testify (Tr. 180).

Petitioner contends that the court's ruling was in error because the convictions did not involve a false statement or dishonesty, and because the court did not specifically find that their probative value outweighed their prejudicial effect. But, as petitioner concedes (Pet. 14), Fed. R. Evid. 609(a)(1) authorizes admission of any felony conviction (including those involved here) for impeachment purposes if "the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." [4/] The court's resolution of this issue need not appear as an explicit finding on the record. The court's decision to admit the evidence, after it heard extended argument on the question (Tr. 174-178), demonstrates that it followed the balancing test required by Rule 609(a)(1). See United States v. Mahone, 537 F.2d 922, 928-929 (7th Cir.), cert. denied, 429 U.S. 1029 (1976). See also United States v. Hayes, 553 F.2d 824, 829 (2d Cir. 1977), cert. denied, 434 U.S. 867 (1978).

As the court of appeals concluded, the trial court's decision that the probative value of the convictions would outweigh their prejudicial effect was not an abuse of discretion. The two homicide convictions were recent, and "convictions have more probative value as they become more recent." United States v. Hayes, supra, 553 F.2d at 828, United States v. Mahone, supra, 537 F.2d at 922; 3 Weinstein's Evidence, ¶906[03] at 609-66 (1977). Additionally, the bank robbery and escape convictions were not so dated as to outweigh their probative effect on petitioner's credibility. See United States v. Wilson, 536 F.2d 883 (9th Cir.), cert. denied, 429 U.S. 902 (1976); 3 Weinstein's Evidence, supra, ¶609[03] at 609-75 n.9.

4/ All petitioner's prior convictions were within 10 years of the present trial and thus not subject to the more stringent admissibility test of Fed. R. Evid. 609(b).

b. Petitioner also contends (Pet. 16-18) that the trial court's instruction to the jury that, in determining the credibility of the witnesses, it should consider "the extent to which, if at all, each witness is either supported or contradicted by other evidence" (Tr. 206) impermissibly highlighted the fact that petitioner presented no evidence. As the court of appeals concluded (Pet. App. 4), the instruction simply admonished the jury to consider all the evidence in reaching a verdict. Contradictions can result from inconsistencies in the government's evidence no less than from inconsistencies between government and defense evidence, and thus the instruction did not necessarily or impermissibly invite the jury's attention to the fact that petitioner did not testify, nor did it impose on him the burden of presenting evidence. Hence, there is no merit to petitioner's argument that the instruction is comparable to the instruction that every witness is presumed to speak the truth when the latter instruction follows the defendant's election not to offer evidence. Compare Cupp v. Naughten, 414 U.S. 141, 145-146 (1973).

c. Petitioner's final contention (Pet. 18) is that the trial court should have granted a mistrial after an FBI agent testified concerning petitioner's post-arrest silence. The FBI agent, who first visited petitioner at the county jail following his arrest, testified that he had addressed the petitioner but that petitioner had said nothing in reply (Tr. 145). Following petitioner's objection and motion for a mistrial (Tr. 145), the trial judge advised the jury that the comment "shall not be taken to mean that the defendant did not make a statement, and [that the jury] should not draw any implication from that" (Tr. 150). Upon further questioning, the agent

testified that, on a subsequent occasion, he went to the cell, called petitioner, and informed him that he was taking him into custody as a federal fugitive. He again testified that petitioner said nothing at that time (Tr. 153).

The court of appeals properly held that, in this context, and given the trial court's cautionary instruction, the testimony did not violate petitioner's rights (Pet. App. 4). Nothing in the agent's testimony suggests that petitioner's silence was an exercise of his right against self-incrimination in the face of post-arrest interrogation (see Doyle v. Ohio, 426 U.S. 610, 618-619 (1976)); indeed there is no evidence that petitioner was interrogated by the agent on either occasion. Compare United States v. Hale, 422 U.S. 171, 176 (1975). Nor is there any possibility that this testimony impeded petitioner's ability to present a defense, as he now claims (Pet. 18). Compare United States v. Hale, supra, 422 U.S. at 176; United States v. Impson, 531 F.2d 274 (5th Cir. 1976). To the contrary, the duress defense proffered by petitioner was unavailable as a matter of law because of his inability to fulfill its requirements, and even if that defense had been available, his failure to make a spontaneous statement when called by the agent would not have damaged its credibility in the least.

Finally, contrary to petitioner's argument (Pet. 18), the prosecutor's remark during his summation that "nothing further happen[ed] that day" (Tr. 189) when the FBI agent first visited petitioner was not a comment upon petitioner's silence.[5/] It

5/ The prosecutor's statement was (Tr. 189):

> The next action sequence or point in the action is in December, on December 23rd, when Special Agent Poe is in the Murray County Jail and the defendant answers to the name Rodney Brown. Also, at this time, you will recall Mr. Poe testified that he happened to see the defendant's hands and each of the points on his hands had a scab right on the point of the hand. Nothing further happens that day.

was simply an allusion to the FBI agent's testimony that, during his first visit, nothing occurred after he addressed petitioner.

CONCLUSION

The Court should defer consideration of this petition pending the decision in United States v. Bailey, and should dispose of the petition in light of that decision. See page 6, supra.

Respectfully submitted.

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